

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAQUILLE JOSHUA,

Defendant and Appellant.

B258779

(Los Angeles County
Super. Ct. No. MA057244)

APPEAL from a judgment of the Superior Court of Los Angeles County,
David Walgren, Judge. Affirmed as Modified.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for
Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Pursuant to a plea agreement, appellant Shaquille Joshua pleaded no contest to one count of second degree robbery (Pen. Code, § 211)¹ and was sentenced in accordance with the terms of that agreement. Following our independent examination of the entire record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), we conclude that no arguable issues exist. We direct the clerk of the superior court to correct a clerical error in the abstract of judgment and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

On June 5, 2012, at approximately 4:55 p.m., Christopher Burgett and two other employees were working at the Superior Pawnshop on Avenue I in Los Angeles County when an African American, wearing all white clothing, a turban on his head, and large “glossy” glasses, entered the shop. The person, who was identified at the preliminary hearing as appellant, was talking on a cell phone and ignored the employees’ offers of help. Shortly thereafter, two more people entered the shop and ran toward the employees. They appeared to have makeup smeared on their faces, as if to cover tattoos. One of them, identified at the preliminary hearing as codefendant Joseph Samuel Gammage, jumped over the shop counter, pointed a gun at the employees, and told them to put their hands up and their heads down. The third person yelled at the employees to keep their hands up and their heads down. Gammage gave the gun to the third person, who trained the gun on Burgett.

¹ Further unspecified statutory references are to the Penal Code.

² The parties stipulated that the police report and preliminary hearing transcript provided a factual basis for appellant’s plea.

Gammage ran to the back of the shop where the safes were kept.³ Gammage returned to the front of the shop and tried to open the glass jewelry displays, which were locked. Burgett gave him the key to prevent him from breaking the glass, and Gammage began removing jewelry items from the displays and placing them on the counter. Appellant, who had been looking outside and trying to close the shop door, began placing the jewelry in bags. Gammage returned to the back of the shop and emerged with jewelry boxes, two guns, and \$6,000 cash. Appellant and Gammage placed the items inside a trash can, and the men began to leave.

As the men left, Gammage walked backwards and told the employees not to do anything until they left. Gammage threw a cell phone at the employees before running out the door. After the three men left, Burgett pushed the shop's panic button. Burgett locked the door and saw an older black car pull out of a parking space rapidly and drive away.

Gammage did not mention any gang names or make any gang signs during the incident. Appellant never spoke to the employees or the other perpetrators during the incident, instead talking on the telephone the entire time. Appellant never handled a gun or made any gang signs. Burgett did not see any tattoos on appellant.

Burgett told Los Angeles County Sheriff's Department deputies that he was not sure whether the person dressed in white was a man or woman. He described the person as having a "prominent pointy chin," light complexion, and no facial hair. Large glasses covered the upper part of the person's face.

Detective Charles Kovach testified at the preliminary hearing that he had investigated approximately a dozen crimes involving the Hoover Criminals street

³ The safes were kept unlocked during business hours. One safe contained jewelry and the other contained guns.

gang, which had approximately 1,000 members, with multiple subsets within the gang. Detective Kovach testified that he previously had interviewed Gammage at a juvenile camp. Detective Kovach opined that Gammage was a member of a set of the Hoover Criminals gang, based on Gammage's tattoos and his admission of his membership to Detective Kovach and other officers.

Detective Kovach also opined that appellant was a member of the Hoover Criminals gang, based on "documents and databases" indicating that appellant had admitted to other officers his affiliation with the gang. Appellant denied any involvement with the gang to Detective Kovach. However, Detective Kovach testified that appellant's tattoos and his admission of gang membership to other law enforcement personnel supported the opinion that appellant was an active gang member. Appellant denied knowing Gammage.

Appellant was charged in an October 2012 information with three counts of second degree robbery. (§ 211.) The information further alleged that the offenses were committed for the benefit of a gang (§ 186.22, subd. (b)(1)(C)) and that a principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)). Appellant entered not guilty pleas to all three counts and denied all allegations.

On June 10, 2013, the court was in the process of taking a no contest plea from appellant when appellant stated, "They convicted me of something I did not do." The court stopped the proceedings, asked further questions of appellant, and took a recess to give appellant time to confer with his attorney, Gabriel Silvers. After conferring with Silvers, appellant entered a no contest plea to one count of second degree robbery (§ 211) and admitted the gang allegation (§ 186.22, subd. (b)(1)(C)). The court found that the plea was knowing and voluntary and found a factual basis for the plea and admission. Silvers concurred in the plea and admission and stipulated to a factual basis based on a review of the police reports and preliminary hearing transcript. The court accepted the plea and admission and

found appellant guilty. The court sentenced appellant pursuant to the plea agreement to the mid term of three years, plus 10 years for the gang allegation, for a total of 13 years. The remaining two counts of the information were dismissed under the plea agreement.

Appellant filed a notice of appeal and requested a certificate of probable cause, asserting that his plea should be ruled invalid and the judgment set aside based on three grounds: appellant's mental incompetence at the time of the plea, insufficient factual basis for the gang enhancement, and ineffective assistance of counsel.⁴ Appellant explained that three days prior to his arrest, he suffered three mini strokes and was hospitalized and thus was required to obtain permission from a doctor to be transported to court. Appellant further asserted that he suffered from dysthymic disorder (a type of depression) and a "schizo-affective disorder" that required mental health treatment. The superior court granted the request for a certificate of probable cause.

DISCUSSION

After review of the record, appellant's court-appointed counsel filed an opening brief asking this court to review the record independently under *Wende, supra*, 25 Cal.3d 436. On November 25, 2015, we advised appellant that he had 30 days within which to submit any contentions or issues that he wished us to consider. On December 24, 2015, appellant filed a supplemental brief, arguing that the factual basis for the gang enhancement was insufficient. He asserts that he has never been a gang member, does not have gang tattoos, and has never appeared in social media photographs with gang members. Appellant also challenges the

⁴ On March 27, 2015, this court granted appellant's application for relief from default for the failure to file a timely notice of appeal.

identification of him as the first perpetrator to enter the pawnshop, stating that he does not fit the description given by the witness. He asserts ineffective assistance of counsel on the ground that Silvers, his attorney, never challenged the gang enhancement and forced appellant to take the deal being offered, advising him that he would not get a fair trial because of his age and race.

Gang Enhancement and Identification by Witness

“Under section 1237.5, a defendant may appeal from a conviction on a plea of guilty or no contest only on grounds going to the legality of the proceedings; such a plea precludes appellate consideration of issues related to guilt or innocence, including the sufficiency of the evidence to support the conviction. [Citations.]” (*People v. Palmer* (2013) 58 Cal.4th 110, 114 (*Palmer*)). However, “any number of appellate opinions have reached the merits of an appellant’s claim that there was no factual basis for his or her plea of guilty or no contest. [Citations.]” (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1368 (*Voit*); see, e.g., *People v. Marlin* (2004) 124 Cal.App.4th 559, 571 (*Marlin*) [concluding that the defendant’s challenge to the factual basis supporting his plea was cognizable on appeal]; *People v. Mickens* (1995) 38 Cal.App.4th 1557, 1564 [“[W]hen trial counsel stipulates to a factual basis for a plea, but appellate counsel claims the plea lacks an adequate factual basis, an appellate court may review the record to determine if it meets the factual basis requirement.”].)

On the other hand, *Voit* held that “[i]ssues concerning the defendant’s guilt or innocence are not cognizable on appeal from a guilty plea. [Citation.] By admitting guilt a defendant waives an appellate challenge to the sufficiency of the evidence of guilt. [Citations.]” (*Voit, supra*, 200 Cal.App.4th at p. 1364.) *Voit* concluded that the issues cognizable on appeal following a guilty plea were limited to those ““based on “reasonable constitutional, jurisdictional, or other grounds

going to the legality of the proceedings” resulting in the plea. [Citations.] The issuance of a certificate of probable cause pursuant to section 1237.5 does not operate to expand the grounds upon which an appeal may be taken as that section relates only to the “procedure in perfecting an appeal from a judgment based on a plea of guilty.” [Citations.]’ [Citation.]” (*Ibid.*)

In *Palmer*, the California Supreme Court found that it was not necessary to decide “whether *Marlin* or *Voit* states the better view” because there, the defendant’s challenge to the factual basis for his plea was more properly characterized as a challenge to “the superior court’s procedure in soliciting facts, not its discretionary evaluation of the facts.” (*Palmer, supra*, 58 Cal.4th at p. 115.)

“‘[A] trial court possesses wide discretion in determining whether a sufficient factual basis exists for a guilty plea. The trial court’s acceptance of the guilty plea, after pursuing an inquiry to satisfy itself that there is a factual basis for the plea, will be reversed only for abuse of discretion.’ [Citation.]” (*Palmer, supra*, 58 Cal.4th at pp. 118-119.) Regardless of whether appellant’s challenge to the gang enhancement is cognizable on appeal, we conclude that the trial court did not abuse its discretion in accepting appellant’s admission to the enhancement.⁵

Appellant’s trial counsel, Silvers, stipulated that the police report and preliminary hearing transcript provided a factual basis for the plea and the admission to the enhancement. Although the police report is not contained in the appellate record, the preliminary hearing transcript is, and it provides a sufficient basis for the admission.

⁵ An enhancement is reviewed in the same manner as a conviction. (See *People v. Wilson* (2008) 44 Cal.4th 758, 806 [“‘We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.]’”]; *Voit, supra*, 200 Cal.App.4th at p. 1364 [“The same restrictions on appellate issues apply after a no contest plea [citations] and the admission of an enhancement [citation].”].)

Detective Kovach testified that appellant was a member of the Hoover Criminals gang based on appellant's tattoo and his admission to other law enforcement personnel that he was a gang member. According to Detective Kovach, appellant had admitted gang membership in three prior contacts with law enforcement personnel that year. Furthermore, contrary to appellant's argument, Detective Kovach testified that robbery is one of the gang's primary activities. When given a hypothetical mirroring the facts of the case, Detective Kovach opined that the robbery was committed for the benefit of, in association with, or at the direction of the Hoover criminal street gang. Based on Detective Kovach's testimony, the trial court did not abuse its discretion in accepting appellant's admission to the gang enhancement.

Appellant further contends that the gang enhancement violates his rights to equal protection and due process because the court did not apply a gang enhancement to his accomplices. However, the gang enhancement under section 186.22, subdivision (b)(1) does not require that the defendant's accomplices be subject to the enhancement. Section 186.22, subdivision (b)(1) applies to "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." There is no requirement that accomplices be subject to the gang enhancement. (See *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138-1139 (*Rodriguez*) [discussing the application of § 186.22, subd. (b)(1) to a "lone perpetrator"].)

Appellant also argues that he does not fit Burgett's description of the suspect as approximately 6 feet 2 inches tall and 180 pounds. However, appellant mistakenly relies on Burgett's description of Gammage, the second person who entered the shop, not of appellant.

Ineffective Assistance of Counsel

Finally, appellant claims ineffective assistance of counsel. He argues that Silvers did not challenge the gang enhancement and forced him to accept the plea deal because he would not be able to obtain a fair trial. Appellant further contends that Silvers failed to keep him apprised of information regarding his case.

“The standard for showing ineffective assistance of counsel is well settled. ‘In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus.’ [Citation.]” (*People v. Gray* (2005) 37 Cal.4th 168, 206-207 (*Gray*).)

The record sheds no light on whether Silvers attempted to challenge the gang enhancement or why he acted or failed to act in the manner challenged. Appellant’s ineffective assistance of counsel claim accordingly must be rejected. (*Gray, supra*, 37 Cal.4th at p. 207.)

We have independently reviewed the record and conclude that there are no arguable issues on appeal. (See *Wende, supra*, 25 Cal.3d at pp. 441–442; see also *Smith v. Robbins* (2000) 528 U.S. 259, 278-279 [upholding the *Wende* procedure].)

The abstract of judgment incorrectly states that the gang enhancement was imposed under subdivision (a) of section 186.22, rather than subdivision (b). “Section 186.22(a) and section 186.22(b)(1) strike at different things.” (*Rodriguez, supra*, 55 Cal.4th at p. 1138.) “To the extent a minute order diverges from the sentencing proceedings it purports to memorialize, it is presumed to be the product of clerical error. [Citation.] . . . As with other clerical errors, discrepancies between an abstract and the actual judgment as orally pronounced are subject to correction at any time, and should be corrected by a reviewing court when detected on appeal. [Citation.]” (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324.)

DISPOSITION

We direct the clerk of the superior court to amend the abstract of judgment to reflect that the gang enhancement was imposed under section 186.22, subdivision (b) and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.